

**Testimony of Elizabeth S. Westfall, Deputy Director of the Voter
Protection Program of Advancement Project**

**Hearing on Voter Registration and List Maintenance (Continued)
Before the Subcommittee on Elections of the
Committee on House Administration
Washington, DC
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Chairwoman Lofgren and Members of the Subcommittee on Elections, my name is Elizabeth S. Westfall. I testify today in my capacity as the Deputy Director of the Voter Protection Program of Advancement Project, a non-partisan, national civil rights and racial justice organization. I am honored to appear before you to share Advancement Project's perspective on voter registration and list maintenance.

Advancement Project is a policy, communication and legal action organization that supports organized communities in their struggles to achieve universal opportunity and a just democracy. Voter protection is a central component of our Power and Democracy program, which supports community-based efforts to increase civic participation, improve election administration, and remove structural barriers to electoral participation in low-income and minority communities.

My testimony today will focus on three topics: (1) voter caging that is conducted for partisan purposes to challenge the eligibility of voters of color; (2) disenfranchisement through list maintenance; and (3) needless restrictions on third-party voter registration activities that deprive eligible citizens of assistance in registering to vote.

**I. VOTER CAGING AND CHALLENGES TO THE ELIGIBILITY OF
MINORITY VOTERS**

"Voter caging" is a private, voter challenge device generated for partisan purposes that seeks to substitute the judgments of partisan interests for public officials about the quality of public voter registration lists and the eligibility of newly registered voters. The device is often used in a racially discriminatory manner to undermine or obfuscate the work of trained, election officials who have the authority, personnel, and duty to maintain the accuracy of voter registration lists and ensure that only eligible voters remain on the rolls. If left uncontrolled, voter caging permits partisan takeovers of voter eligibility determinations, and thus elections, and at a minimum, causes substantial disruptions of polling place operations on Election Day.

A. Background on Voter Caging

"Voter caging" is a partisan, discriminatory method of challenging the eligibility of voters of color. The term derives from the use of politically motivated, direct mailings that are sent to targeted voters. Typically, a political party sends registered mail to the

addresses of targeted registered voters. If the mail is returned as undeliverable—because the voter, for example, refuses to sign for it, is not present for the delivery, refuses to accept registered mail, or is homeless—the party adds that voter to what is known as a “caging list.” The party, pursuant to a state challenger statute, then challenges the eligibility of the voters on the “caging list” on the ground that because the registered mail directed to the address was returned as undeliverable, the applicant does not reside at that address and the registration is fraudulent. Once a challenge is made to a voter’s registration, the voter must prove that her registration is valid.

Voter caging and challenges have often been employed to disenfranchise voters of color. The historical origins of state challenger statutes suggest that the very purpose of those statutes is to interfere with the voting rights of African-Americans.¹ In Florida, for example, the state challenge statute, now codified in Fla. Stat. § 101.111, has its roots in Reconstruction Era laws intended to curtail the ability of newly freed slaves to participate in elections. In 1865, the Florida legislature adopted a state constitution that restricted the right to vote and to hold office to white men. Two years later, federal law extended the right to vote to African-American men. And in 1868, after African-American men began to vote in large numbers, the Florida legislature enacted its challenge statute that granted poll watchers the authority to challenge a voter’s registration status. Likewise, in 1859, Ohio enacted a statute permitting challenges to a voter’s registration status if the voter had “visible admixture of African blood.” Challenges continue to be employed in a racially discriminatory manner today.

B. DNC v. RNC

In 1981, the Republican National Committee (“RNC”) sent letters to predominantly African-American neighborhoods in New Jersey and from the letters that were returned as undeliverable, the RNC compiled a list of voters to challenge. On Election Day, the RNC sent off-duty law enforcement officials to the polls and hung posters in heavily African-American neighborhoods warning that violating election laws is a crime.

In response, the Democratic National Committee (“DNC”) filed a federal lawsuit against the RNC in New Jersey. The *DNC v. RNC* lawsuit resulted in the issuance of a consent decree that requires the RNC, nationwide, to refrain from undertaking ballot security activities in polling places or election districts where the racial composition of such districts is a factor in the decision to conduct such activities (“consent decree”).

In 1986, the RNC was found to have violated the consent decree, when it challenged the voter registration status of 31,000 predominantly African-American voters, in Louisiana, to whom the RNC had sent a party mailer which was returned as undeliverable. As a result, in 1987, the consent decree was amended to require the RNC

¹ Advancement Project, *Report to State and Local Officials on the Urgent Need for Instructions for Partisan Poll Watcher* (Oct. 2004) (attached hereto as Ex. 1).

to obtain prior approval for all “ballot security” efforts, which may include “efforts to prevent or remedy vote fraud.”²

C. Voter Caging in 2004

In the months leading up to the 2004 presidential election, voter protection advocates became concerned that a large scale effort would be undertaken to challenge the eligibility of African-American and Latino voters. Advocates were particularly fearful that voters of color would be subject to voter caging and subsequent challenges to their registration.

In October 2004, the Ohio Republican Party (“ORP”) compiled a list of 35,000 newly registered Ohio voters and prepared to challenge persons on the list based on “mail returned to the party.” The mail was sorted according to zip codes. Pursuant to a state statute permitting political parties to station “poll watchers” inside polling places to challenge a person’s right to vote, the ORP registered challengers in five counties in Ohio—in which 73% of all African Americans in the state resided—and targeted precincts with high concentrations of African Americans.

Under then-current law, Ohio required challenges to be filed eleven days before the election and provided hearings on challenges to a voter’s registration. As a result of the ORP’s challenges, Ohio county boards of elections were overwhelmed and unable to conduct all hearings before Election Day. Advancement Project’s coalition partners interviewed local election officials about the ORP’s challenges and were told that officials expected the challenges to result in long lines at the polls, poll worker confusion, and chaos in precincts where large numbers of African-American voters were expected to cast ballots.

Ohio was not the only state in which state Republican parties resorted to caging procedures to challenge voters.³ For example, in Wisconsin, the state Republican Party used U.S. Postal Service software to scrutinize the addresses of over 300,000 registered voters in Milwaukee to determine whether the addresses were valid. After the Republican Party registered 5,600 challenges against Milwaukee voters, the city attorney reviewed the list of challenged voters and found that hundreds of the addresses, claimed by the party to be nonexistent, were actually legitimate.

In Florida, the state Republican Party undertook a caging operation that was similar to the one employed in Ohio. There, the Florida Republican Party sent a non-forwardable mailing to Democratic and African-American voters and compiled the returned mail into a list to challenge voters. Documents filed by the state republican party in five counties indicating their plans to deploy poll watchers revealed that the party

² *Democratic National Committee v. Republican National Committee* (July 27, 1987) (Settlement Stipulation and Order of Dismissal).

³ For a comprehensive discussion of caging operations in 2004, see Project Vote, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters*, 16-20 (Sept. 2007).

stationed its poll watchers disproportionately in predominantly African-American precincts.

D. Motion To Intervene and Reopen the DNC v. RNC case

Four days before the 2004 presidential election, Advancement Project filed a motion to intervene and reopen the *DNC v. RNC* case on behalf of an Ohio voter, Ebony Malone.⁴ Ms. Malone was a newly registered African-American citizen of Cleveland who was on the list of voters to be challenged by the Ohio Republican Party.

The district court granted Ms. Malone's motion to intervene, and on November 1, one day before the election, found that the RNC had violated the consent decree and ordered the RNC to refrain from using its compiled list of voters to challenge those voters. Although the Third Circuit Court of Appeals granted the RNC's motion to stay of the lower court's order, the stay was issued so late on Election Day that the district court's order, along with orders issued in other concurrent cases challenging the challenges, resulted in an absence of widespread challenges on Election Day. And Ms. Malone successfully cast a ballot without being challenged.

E. Recent Amendments to State Challenger Statutes

Since 2004, several states have amended their voter challenge laws to expand the rights of challengers and reduce the rights of voters. Current Florida law requires challengers to have only a "good faith belief," rather than personal knowledge, to issue a challenge to a voter.⁵ Ohio voters are no longer entitled to notice and a hearing based on a pre-election challenge.⁶ Instead, the voter's board of elections may render a determination of the voter's registration based solely on records possessed by the board. On a positive note, challengers are no longer permitted in the precincts in Ohio; only poll workers can challenge a voter. In Pennsylvania, partisan poll watchers are no longer required to remain in polling places where they are officially registered; they are now permitted to move within polling places in their specific county. As a result, poll watchers will have a greater capacity to challenge more voters.⁷

F. Recommendations

Advancement Project recommends that Congress take steps to prohibit voter caging and voter challenges by private citizens. These tactics should be prohibited first and foremost because they are not necessary for the accomplishment of appropriate list maintenance activities. Instead, they have been employed historically to keep voters of color off the rolls. Further, voter caging has a chilling effect on voter participation

⁴ *Democratic National Committee v. Republican National Committee*, Civ. Action No. 81-3876 (Oct. 27, 2004) (Complaint in Intervention for Preliminary and Permanent Injunctive and Declaratory Relief).

⁵ Fla. Stat. § 101.111.

⁶ O.R.C. Ann. § 3505.24.

⁷ Compare 2002 Pa. ALS 44 (2002) (restricting poll watchers to one district in a municipality or township in which the watcher is a registered voter) with 25 P.S. 2687 (2007) (poll watchers may serve more than one election district in the county in which the watcher is a registered voter).

because eligible voters who are listed on the voter registration rolls, especially inexperienced or newly registered voters, are less likely to vote if they face voter intimidation by challengers who confront them at the polls or if challenges of other voters create confusion, cause disruption, or generate long lines and unnecessary delays on Election Day.

Determining whether a voter registration applicant is eligible to vote, and whether a registered voter should be purged from the rolls, should be left to state or local election officials. Likewise, all politically-motivated interference by the U.S. Justice Department in state, county, and local list maintenance procedures must be strictly prohibited.

Advancement Project recommends that at a bare minimum, Congress enact legislation that: (1) prohibits challenges to a person's eligibility to register to vote, or cast a ballot, based solely on returned mail or a caging list;⁸ (2) requires that challengers base their challenge on personal knowledge and set forth specific grounds for their purported ineligibility under penalty of perjury; and (3) prohibits partisan poll watchers from challenging voters at the polls on Election Day, in order to prevent the chaos and voter suppression that Election Day challenges cause.

II. DISENFRANCHISEMENT THROUGH LIST MAINTENANCE

Although the National Voter Registration Act was intended, in part, to ensure that voters are not wrongfully purged from the rolls, Advancement Project's recent investigations of several purging programs reveal that large numbers of voters may have been wrongfully targeted for purging.

A. Michigan's Errors in Purging Voters on the Basis of Death

In 2006, the Michigan Secretary of State began a program under which it compared its Qualified Voter File ("QVF"), the statewide voter registration database, with the Social Security Administration's nationwide Death Master File and, where matches were found, purged the names of the presumably deceased voters. The state used two match criteria: (1) [Exact First Name] [Exact Last Name] [DOB] and (2) [First Letter of First Name] [Exact Last Name] [Exact DOB] [Exact ZIP Code]. Approximately 60,000 QVF records were marked for cancellation under this procedure, 94% of which were based upon the first set of match criteria. Of those 60,000, approximately 40,000 had no voting history in the QVF and were cancelled immediately without notice. Notices were sent to the remaining 20,000 registrants who had voting history in the QVF, indicating that they were being cancelled, along with a contact number to call if they were, in fact, not deceased.

⁸ See also Minn. Stat. § 204C.07, Subd. 5 ("Challengers and the political parties that appointed them must not compile lists of voters to challenge on the basis of mail sent by a political party that was returned as undeliverable or if receipt by the intended recipient was not acknowledged in the case of registered mail. This subdivision applies to any local, state, or national affiliate of a political party that has appointed challengers, as well as any subcontractors, vendors, or other individuals acting as agents on behalf of a political party.").

In response, approximately 400 of the 20,000 voters who were mailed a notice responded and indicated they had been canceled in error. Those voters' registrations were reinstated by the state. According to a state elections official, the second set of match criteria had higher error rates than the first set and was "too loose," which led to quite a high number of mismatches. In addition, according to the state, the state's failure to exclude those individuals who had voting histories after their listed date of death was also problematic, resulting in an error rate of 94% among those votes. Part of the problem was also attributable to the fact that the state was operating off of a Death Master File (DMF) that it purchased in May 2005 for their purge program in 2006, which did not take into account the corrections that the Social Security Administration may have made to the database in the intervening year.

B. Louisiana's Errors in Purging Displaced Voters on the Basis of Having Registered Elsewhere

Prior to Hurricanes Katrina and Rita, New Orleans had approximately 297,000 registered voters listed on the rolls. Currently, there are approximately 278,000 on the rolls. Louisiana state law requires the Secretary of State to conduct an annual canvass, under which notices are mailed to every registered voter on the rolls. If the notice is returned as undeliverable, the list maintenance process commences, and the voter is placed on the inactive list. Then, if the voter either does not contact the local parish registrar of voters to update his or her address or does not vote in either of the next two federal elections, the voter's registration is cancelled, and he or she is removed from the rolls.

In Advancement Project's ongoing investigation of barriers to voting in Louisiana since the 2005 hurricanes and, specifically, in discussions with the Orleans Parish Registrar of Voters, Dr. Sandra Wilson, we learned that following the annual canvass of voters in 2007, approximately 105,000 of the 278,000 voters in New Orleans were placed on the inactive list because their notices were returned by the postal service as undeliverable. Many of these voters were displaced by the storm and during the past two years, may have moved several times. As a result, many of these displaced voters did not have current forwarding addresses on file with the Postal Service, either because they never filed a change of address or because their addresses had changed since they last filed a change of address. Thus, these voters likely never received their notices from the local registrar and, therefore, are unaware that their registration status is in jeopardy.

Similarly, we learned from Dr. Wilson that in June and July of this year, approximately 7,000 New Orleans registrants were targeted for removal from the voter rolls at the direction of the Secretary of State as a result of information that his office obtained through cooperative agreements with eight other states, which indicated that the voters had registered to vote in another state. However, upon further investigation and follow-up with those voters, the Orleans Parish Registrar and her staff confirmed that all but approximately 109 of these voters had either not registered in another jurisdiction or had not intended to register in another jurisdiction. In other words, but for the diligence

of the local registrar and responsive voters, the Secretary of State's purging protocol would have unfairly removed nearly 6, 900 eligible voters from the Louisiana voter registration rolls. As Kristin Clarke of the NAACP Legal Defense and Education Fund indicated in her testimony to this Committee on October 23, 2007, this reveals serious flaws in list maintenance methodology and procedures.

C. Recommendations

State and local election officials have a tremendous amount of flexibility and discretion in how they conduct list maintenance activities, provided that their procedures are uniform, nondiscriminatory and in compliance with the Voting Rights Act. While the NVRA requires notice and certain safeguards to particular categories of voters who are targeted for purging, in many states, large numbers of voters receive no notice whatsoever before they are purged from the rolls. Depending upon the matching criteria employed, states' attempts to match records of voters in their database with records of individuals in other state's databases or death registries may result in false matches. Absent notice to the voter, the voter will be unaware that she has been purged until she appears at the polls on Election Day and learns that her name does not appear on the register. Even if states do attempt to notify voters, in low income communities of color, ineffectiveness of mail delivery may prevent voters from receiving actual notice that they have been flagged for purging from the rolls.

Advancement Project recommends that Congress enact legislation that: (1) directs the Election Administration Commission ("EAC") to convene a panel of experts, including election officials, voter protection advocates and data matching experts, to develop and recommend to Congress best practices for matching voters' information to information in other databases; (2) requires that all voters targeted for purging receive written notice and a postage-prepaid return reply card by forwardable first-class mail that they are slated to be purged and the basis for the purging, and that such voters be provided with a reasonable opportunity (e.g. 45 days) to contest their purging from the rolls; (3) ensures that voters are not purged from the rolls for non-voting; and (4) requires state and local election officials to promulgate written policies and procedures related to list maintenance.⁹

III. NEEDLESS RESTRICTIONS ON THIRD-PARTY VOTER REGISTRATION ACTIVITIES

The National Voter Registration Act established voter registration by mail for all federal elections and specifically empowered and encouraged private groups to organize voter registration drives using the national mail voter registration form. Third-party voter registration groups seek to register eligible applicants who are among the least represented in the democratic process. These historically disenfranchised applicants often benefit from assistance in registering to vote. For example, according to U.S.

⁹ Advancement Project supports the recommendations concerning list maintenance set forth in the Testimony of Deborah Goldberg, Director, Democracy Program, Brennan Center for Justice at NYU School of Law, Subcomm. On Elections Comm. On House Administration (Oct. 23, 2007) at 5-8.

Census Bureau statistics on voter registration in Florida, in the November 2004 election, the last statewide contest before Florida's third-party voter registration law, that is described below, went into effect, 17% of African-American voters and 19% of Hispanic voters in Florida registered to vote through voter registration drives, whereas only 7% of white voters did so. Similarly, 23% of voters in households where only Spanish was spoken were registered through drives, versus only 9% of households in which Spanish was not the only language spoken.

In spite of Congress's efforts to enhance and facilitate voter registration through the use of mail registration and through private/third-party voter registration drives, several states have recently erected onerous barriers that have prevented or significantly curtailed community-based voter registration drives by such groups. Some states, like Florida, imposed heavy fines and criminal penalties on third-party groups which did not adhere to strict submission deadlines and other voter registration requirements. Others, like Georgia, prevented third-party organizations from accepting applications from registrants unless they were sealed and prevented third-party groups and voter registrants from retaining a copy of their completed registration application. Advancement Project is co-counsel in challenges to these barriers to third-party voter registration, which federal courts have enjoined as violating the First Amendment or the NVRA.

Recommendation

The NVRA was intended to encourage third-party voter registration activities, thereby increasing voter registration and voter participation. States' efforts, such as those described above, that needlessly restrict third-party voter registration activity thwart the intent of the NVRA. Advancement Project recommends that Congress takes steps to ensure that states do not chill or otherwise deter third-party voter registration groups from registering voters.